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Supreme Court, U.S.
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ALEXANDER L. STEVAS, JR.

No. 84-1987

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

WILHELMINA MOORE,

Petitioner,

vs.

HENRY E. BONNER, individually and in his official capacity as superintendent of schools for Berkeley County and Chairman of the Berkeley County Board of Education; MARVIN WIGGINS, JOSEPH MYERS, ROY STRICKLAND, HAROLD STALEY, GRAYDON GRAY, JAMES BARRY, CAROLYN LEWIS, J.P. PEAGLER, DOROTHY BRYAN, AND DAVID FASHION, each individually and each in his or her official capacity as a member of the Berkeley County Board of Education and the Berkeley County School District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether any right to procedural due process which Petitioner may be said to assert regarding the renewal of her employment or the hearing challenging that action, was violated by Respondents.

2. Whether the refusal to admit evidence of alleged non-compliance with a desegregation order or the failure to charge the jury regarding recent history of racial discrimination or intentional segregative action was error when the trial court, in any event, shifted to Respondents the burden of proving by clear and convincing evidence that their action was nondiscriminatory.

3. Whether, in this non-criminal proceeding and for the first time before this Court, Petitioner can assert a claim for violation of the Sixth Amendment right to competent counsel.

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CITATION TO OPINIONS AND JUDGMENTS BELOW

The unpublished opinion of the Court of Appeals is reproduced in Appendix C to the Petition for a Writ of Certiorari. The unreported opinions of the District Court are reproduced in Appendices A and B to the Petition for a Writ of Certiorari.

STATEMENT OF GROUNDS FOR JURISDICTION

Petitioner fails to assert the grounds upon which this Court's jurisdiction is based. Apparently, the Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves questions under 42 U.S.C. §§ 1981 and 1983 and under Section 1 of the Fourteenth Amendment to the United States Constitution, which provide:

> All persons within the jurisdiction of the United States

> shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1976).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1976).

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. XIV, § 1. The case also involves a proceeding under the South Carolina Employment and Dismissal of Teachers Act, S.C. Code Ann. §§ 59-25-410 to -530 (1976 & Supp. 1984), which is set forth in Appendix 1 to this brief.

STATEMENT OF THE CASE

Petitioner, Wilhelmina Moore, prior to the 1980-81 school year, was a black guidance counselor at Cross High School within Respondent Berkeley County School District, Berkeley County, South

Carolina. Petitioner was employed by Respondent Berkeley County Board of Education, whose individual members in both their official and personal capacities are also Respondents.

Petitioner's civil rights complaint in the District Court challenged the decision by Respondents not to renew Moore's teaching contract for the 1980-81 year based on the following incidents and events.

On January 24, 1980, Ms. Glenna Best, Title 1 Reading Director for the Berkeley County School District (hereinafter "the District"), arrived at Cross High School to administer a Title 1 reading test to students. Arrangements had been made the prior day with the school principal and the teacher of the students for the administration of the test.

As Ms. Best entered the library of the school, she was confronted by Petitioner. Moore stated to Best that she (Best) had no right to be there to administer the test. Moore approached the students to be tested and instructed them that they were not to take the test. She stated that if they did take the test, she would call the students' parents and help them "cut their [students'] behinds."

As a result of Moore's outburst, carried out in front of the students, the test could not be given. Ms. Best returned to the District office and reported the matter to her supervisor, who in turn reported the matter to the Superintendent of the District, Respondent Bonner.

By letter dated February 1, 1980, Bonner informed Moore:

> I am writing to respectfully request that you provide me

> with a written description of the incident in which you allegedly attempted to stop Ms. Glenna Best, Title 1 Reading Director, from giving tests to Title 1 students on Thursday, January 24, 1980.

When Moore failed to provide the requested description of the incident, Bonner sent a second letter to Moore, dated February 19, 1980, which contained the following statement:

> Your response to my request that you give me a written description of the incident in which you attempted to stop Ms. Glenna Best, Title 1 Reading Director, from giving tests to Title 1 students is not satisfactory...you need to let us know why you interfered with the normal ongoing process of the school. Your explanation may have a bearing on whether you are recommended for reemployment for the 1980-81 school term.

Petitioner also failed to respond to this request by Bonner for an explanation of her interference with the test. Instead, almost a month later,

Moore sent a letter to Bonner requesting a written account of any charges against her, the name of the individual making the charges, and an open hearing before the Board.

Because no explanation of her actions on January 24 was included in Moore's letter, Bonner informed Petitioner by letter dated April 1, 1980, that he planned to recommend to the Berkeley County Board of Education (hereinafter "the Board") that Moore's teaching contract not be renewed for the 1980-81 school year for the reason that she had "deliberately disregarded the instructions given to [her] in [Bonner's] letter dated February 19, 1980." The April 1 letter also informed Moore of her right to a hearing challenging the recommendation for nonrenewal under the South Carolina Employ-

ment and Dismissal of Teachers Act, S.C. Code Ann. §§ 59-25-410 to -530 (1976 & Supp. 1984).

Pursuant to her request, on May 6, 1980, Moore was afforded a full-scale trial-type hearing under the Employment and Dismissal Act. By statute, the Superintendent had the burden of establishing that good and just cause existed for the action. Moore was represented by counsel at the hearing, and was allowed to cross-examine witnesses and to present witnesses and testify on her own behalf.

By letter dated May 16, 1980, the Board informed Moore of its decision to uphold the recommendation for nonrenewal, based upon Moore's unprofessional conduct and insubordination in regard to the January 24th incident and its aftermath.

Petitioner then filed an action in the District Court contesting her non-renewal on the grounds that her rights to procedural due process and free speech and association had been violated, and that she had been subject to race discrimination.

Upon motion of Respondents, the District Court directed a verdict against Petitioner on her First Amendment and due process claims. The question of racial discrimination was submitted to the jury, which rendered a verdict in Respondents' favor and against Moore. The District Court later denied Petitioner's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

On May 21, 1984, Petitioner noticed an appeal from the District Court's decision to the Court of Appeals for the

Fourth Circuit. On March 25, 1985, the Fourth Circuit issued an order affirming the District Court's decision in all respects.

REASONS FOR DENYING THE WRIT

The instant case involves the termination of a single school teacher, based upon a specific, and somewhat unique, factual situation. In reaching its decision, the Fourth Circuit considered the particular factual situation and applied to those specific facts well-accepted principles of civil rights law. Not only were the issues given full consideration and decided correctly, but also those issues are not sufficiently important to warrant this Court's attention. Indeed, the arguments made by Petitioner, acting pro se, in support of further review of prior issues and first review of a new issue

based upon right to counsel are totally without merit, if not frivolous. The outcome of the case in the courts below was of importance solely to the litigants in this action. The public at large will remain unaffected by the decision, as will all other litigants, unless an almost identical situation should arise in the future. As this Court has consistently held, it does not "grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Accordingly, certiorari should be denied.

I. Certiorari Should Be Denied For The Reason That The Court Below Gave Full Consideration To All Due Process Claims Arguably Raised And Decided Them Correctly

Petitioner seeks further review of three due process issues, two of which

are recognizable (Petitioner's Questions 2 and 3) and one of which is so vague and general as hardly to permit response (Petitioner's Question 1).

Petitioner's Question 2 raises a due process issue concerning a combination of investigative and adjudicative functions in one body which has been sanctioned in numerous decisions by this Court. Withrow v. Larkin, 421 U.S. 35 (1974); Hortonville Joint School District No. 1 v. Hortonville Education Association, 423 U.S. 1301 (1975). Because Petitioner at no time has claimed that the School Board members were biased by an "extrajudicial" source which resulted in a decision on some basis other than that which they learned from their participation in the case, no procedural due process violation results from the Board having heard Petitioner's

appeal under the Employment and Dismissal Act subsequent to its earlier approval of the Superintendent's recommendation for nonrenewal. See Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 517 (4th Cir. 1974).

Similarly, the due process issue raised in Petitioner's Question 3 relating to an alleged failure to follow the District's own policies also was resolved correctly by the Court of Appeals. This Court has held that due process requires notice and "some kind of a hearing" before the discharge of an employee who has a constitutionally protected property interest in continued employment. Board of Regents v. Roth, 408 U.S. 564, 569-70; Perry v. Sindermann, 408 U.S. 593, 599 (1972). In the specific context of teacher terminations, the Fourth Circuit has held that

procedural due process requires adequate notice, a specification of the charges, an opportunity to confront adverse witnesses, and an opportunity to be heard in one's own defense. Grimes v. Nottaway County School Board, 462 F.2d 650 (4th Cir. 1972); see Vance v. Chester County Board of School Trustees, 504 F.2d 820 (4th Cir. 1974). There can be no question that the Employment and Dismissal Act, which provides a full-fledged trial-type hearing, satisfies all these requirements. See S.C. Code Ann. §§ 59-25-410 to -530 (1976 & Supp. 1984).

Even assuming that Respondents failed to follow their own policies in connection with the decision not to renew Petitioner's contract,[1] no due

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[1] The District Court found that the policies to which Petitioner makes reference did not apply to the circumstances of the instant case.

process violation resulted. Several circuit courts have held that where minimal procedural due process is afforded, failure to comply with state procedural regulations does not violate constitutional guarantees. Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984); Attencio v. Board of Education, 658 F.2d 774 (10th Cir. 1981); Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976). See Steebe v. United States Railroad Retirement Board, 708 F.2d 250 (7th Cir. 1983); Smith v. State of Georgia, 684 F.2d 729 (11th Cir. 1982); Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979); see also Garrett v. Mathews, 625 F.2d 658 (5th Cir. 1980); Colby-Bates-Bowdoin Educational Telecasting Corporation v. Federal Communications Commission, 534 F.2d 11 (1st Cir. 1976). In the present case, the

greater than constitutionally minimal procedures of the Employment and Dismissal Act were afforded Petitioner. Therefore, a failure by Respondents to follow their own policies does not violate the due process clause.

As suggested, the due process issue raised in Petitioner's Question 1 is too general to permit specific response. It should be pointed out that the courts below gave full consideration to due process claims based on inadequate notice, on the Board's lack of academic expertise, and on an inadequate statement of reasons for the decision. Whether or not Petitioner envisions that her generalized Question 1 encompasses any of these claims cannot be known.

To the extent Question 1 can be read to encompass an issue based on the right to a pre-deprivation hearing under

this Court's recent decision in Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306 (March 19, 1985), such an issue will be addressed by Respondents. The requirement of Loudermill that an individual be given an opportunity for a hearing before he is deprived of any significant property interest was satisfied in the instant case because Petitioner was given a full adversary hearing under the Employment and Dismissal Act on May 6, 1980, prior to the nonrenewal of her contract for the following school year becoming final. Petitioner did not suffer any deprivation of salary or job benefits or privileges before her hearing.

II. Certiorari Should Be Denied For The Reason That The Courts Below Properly Shifted To Respondents The Burden Of Proving Nondiscrimination By Clear And Convincing Evidence; Therefore, Petitioner's Claims Based

Upon The Failure To Admit Certain Evidence For The Purpose Of Shifting The Burden Did Not Result In Harm

Two grounds for which Petitioner seeks review involve evidentiary issues related to the burden shifting mechanism employed in the resolution of Petitioner's equal protection claim (Questions 4 and 5). Petitioner contends that the District Court's failure to allow her to litigate directly the question of Respondents' compliance with a 1970 consent desegregation order was error. The court duly considered, and correctly refused, Plaintiff's request to present directly to the jury proof of noncompliance with that order. The purpose of offering evidence on the issue of compliance with the order was only to shift to Respondents the heightened burden of justifying their conduct

by clear and convincing evidence. Knighton v. Laurens County School District No. 56, 721 F.2d 976 (4th Cir. 1983). See Keyes v. School District No. 1, 413 U.S. 189 (1973); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (4th Cir. 1966). Although Petitioner was not allowed to litigate the actual issue of noncompliance, she was permitted to introduce evidence which did have the effect of shifting the heightened burden of proof to Respondents.[2] That evidence, as the Fourth Circuit noted, was statistical data concerning the racial composition of the schools. Petitioner also was permitted to make a showing, accepted by the trial court, that there had been a recent history of racial discrimination

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[2] In addition, the District Court admitted the order for the purpose of the court's consideration.

or segregative action. These matters of evidence shifted the burden of persuasion to Respondents under the higher standard of proof. The courts below correctly determined that an actual adjudication of compliance or noncompliance with the desegregation plan in this individual discharge case would have been unnecessary given the burden-shifting effect of the other evidence and would possibly have led to confusion of the issues to the jury.

Petitioner also argues that the District Court erred by failing to charge the jury concerning a recent history of racial discrimination or intentional segregative action within the District. No objection to the charges was made by Petitioner prior to the jury deliberations, as required by Fed. R. Civ. P. 51. Moreover, Peti-

tioner was allowed to present evidence on this question to the jury, and the jury, as stated, was charged that Respondents had the heightened burden of justifying their conduct by clear and convincing evidence. Therefore, no possible harm to Petitioner resulted.

III. Certiorari Should Be Denied On The Question of Competent Representation By Counsel Because Not Only Does The Sixth Amendment Right To Counsel Have No Application To Civil Proceedings, But Nothing Which Petitioner's Counsel Did Or Failed To Do At Trial Amounted To Incompetent Representation

Respondents assume for present purposes, without necessarily conceding, that the failure of this pro se Petitioner to raise before the Court of Appeals any issue regarding competency of counsel may not constitute a waiver of her right to raise such an issue

before this Court. See Pollard v. United States, 352 U.S. 354, 358 (1957) (Court waived requirement that questions be raised below to allow indigent criminal defendant, who had proceeded pro se below, to raise important criminal law issue).

Assuming the issue of the competency of Petitioner's counsel in the District Court is properly before the Court, it is clear for several reasons that the Petitioner's contention is totally without merit. Not only does the Sixth Amendment right to competent counsel have no application to civil proceedings, but nothing which Petitioner's counsel did or failed to do at trial amounts to incompetent representation.

It is apparent from the very language of the Sixth Amendment that the

right to counsel, and thus the right to competent counsel, see Powell v. Alabama, 287 U.S. 45 (1932), is limited to criminal proceedings. "In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense." U.S. CONST. Amend. VI (emphasis added). This limitation is so apparent from the plain language of the amendment that an argument in favor of the application of the right in non-criminal proceedings has never been raised in any found decision. Petitioner cites no authority which even arguably supports a different result. Accordingly, any argument Petitioner seeks to make relating to the alleged incompetency of her attorney in the civil action below should be rejected.

Even assuming some right to competent counsel were held to apply in civil

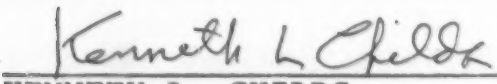
cases, it is clear under the circumstances of this case that that right was not violated. The asserted failure of counsel to seek the introduction of evidence concerning other racially discriminatory discharges had no effect on the outcome of this case. Evidence of other discriminatory discharges would have served, ultimately, only to shift to Respondents the heightened burden of establishing by clear and convincing evidence that their action was nondiscriminatory. This shifting of a heightened burden of proof was accomplished anyway through the introduction of other evidence, as discussed supra, pages 17-21. Therefore, any failure to introduce evidence of other discriminatory dismissals caused no harm to Petitioner's case.

CONCLUSION

The Courts below gave full consideration to the issues raised by Petitioner and decided them correctly in accordance with recognized and accepted principles of civil rights law. The issues raised by Petitioner are not novel; the decision on those issues is not in conflict with any decision of this Court or of the appellate courts. The resolution of those issues below turned upon the particular facts of the rather unique incidents or events which led to Petitioner's discharge, and was of significance only to the litigants in this case. There are thus no special or important reasons favoring this Court's exercise of its discretionary power of review. Accordingly, the Petition for a

Writ of Certiorari should be denied.

Respectfully submitted,



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